IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 47

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SEATRAIN LINES, INC., ET AL.,

Appellants,

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL.,

No. 48

THE PENNSYLVANIA RAILROAD COMPANY, ET AL.,

Appellants,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SEATRAIN LINES, INC., ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

Reply Brief for The Pennsylvania Railroad Company, et al., Appellants in No. 48, Appellees in No. 47.

JOHN VANCE HEWITT,
JOHN A. HARTPENCE,
JOSEPH F. ESHELMAN,
R. AUBREY BOGLEY,
Counsel for Appellants in No. 48, Appellees in No. 47.

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Reply Brief for The Pennsylvania Railroad Company, et al., Appellants in No. 48, Appellees in No. 47.

This brief is submitted in reply to the brief of the United States and the Interstate Commerce Commission which was served on December 19, 1944, and which will be

referred to herein as the Commission's brief; and in reply to the brief of Seatrain Lines, Inc., Forrest S. Smith, Trustee of Hoboken Manufacturers Railroad Company, its subsidiary, and New Orleans & Lower Coast Railroad Company, its affiliate, which was served on December 29, 1944, and which will be referred to herein as Seatrain's brief.

Answering "I" in Commission's Brief and "Point I" in Seatrain's Brief.

In our Main Brief we urged that exchange of cars between carriers could be enforced only under the car service provisions, Sec. 1(10) to (14); that as those sections are limited to carriers by railroad, railroads could not be compelled to deliver their cars for use by Seatrain. It must be noted that whenever Congress intended to apply existing sections to carriers subject to the newly-enacted Part III that was done by specific and appropriate words, as in Secs. 1(4) and 15(3), such as the authority in the latter provision to establish through routes "by carriers by railroad subject to this Part and common carriers by water subject to Part III, * * *." No such addition was made to the car service provisions.

The Commission makes no contention that the car service provisions afford the power which it has sought to exercise, and attempts to find jurisdiction by implication from other portions of the Act.* Seatrain, while it also relies largely upon such implications, in addition contends (pp. 41-2) that, despite the limitation of the car service provisions to carriers by railroad, these provisions are applicable

* In view of the express provisions, no duty or power to enforce such duty can rest on implication. See our Main Brief, pp. 20-22.

to interchange with water carriers. It says that "The 'interchange' referred to therein is, of course, defined as interchange *by* a 'carrier by railroad', but the statute does not say that this means only interchange *with* another carrier by railroad". This violates the definition of interchange, viz.:

> "Interchange * * * 1. To put each in the place of the other; to give and take *mutually*; to exchange; *reciprocate* * * *." (italics supplied). (Webster's New International Dictionary, Second Edition).
>
> "Interchange * * * 1. To put each of two things in the place of the other; receive and return reciprocally." (Practical Standard Dictionary).
>
> "Interchange. To exchange; to give and take mutually; to put each in the place of the other; to reciprocate." (33 C. J. 171)

Although it is thus made clear that Congress had no intention to compel a railroad to turn over its cars to any but another railroad, Seatrain urges (p. 41) that the duty to turn over a railroad's car to a carrier by water is created by the inclusion of the terms "use", "supply", and "distribution" in the definition of "car service". The words "use" and "supply" were added to the Act by the 1920 amendment. As stated by a member of the Commission, at a hearing on the bill before the Committee on Interstate and Foreign Commerce of the House of Representatives, the purpose was to empower the Commission "to require a carrier to provide itself with locomotives, cars, and other vehicles used in the transportation of property * * *". The other new provision then inserted was "the extension of the jurisdiction to the supply, movement, and operation of

trains. That * * * will come into play in times of emergency, car shortage, etc., and in connection with the common use of tracks or terminals when the public interest demands such use". See *Wisconsin R.R. Commission* v. *Chicago & Northwestern Ry. Co.*, 87 I.C.C. 195, 197. Therefore, these words, upon which Seatrain relies manifestly apply to matters other than the compulsory surrender of its cars by a railroad. That duty, so far as it exists, is embraced in the provision for "exchange, interchange, and return".

"Use * * * by any carrier by railroad" certainly does not contemplate, as Seatrain urges (pp. 41-2), delivery of a "car loaded with freight to a connecting carrier, whether by rail or by water, in order to complete a through transportation undertaking which the railroad has contracted to carry out." In this argument, which effectively epitomizes the discussion at pages 36-8 of its brief, Seatrain has inverted the consequent and the antecedent. The railroad has not "contracted to carry out" a through transportation without breaking bulk if it has no duty to interchange cars with Seatrain. It is still necessary to find where that duty arises. See *United States* v. *Pennsylvania R.R. Co.*, 242 U. S. 208, 236.

Seatrain seems to infer further (p. 42), that as the words "supply" and "distribution", also found in the car service provisions, "do not mean supply and distribution only to other railroads", so likewise "exchange, interchange and return" may cover transactions with carriers other than those by railroad. But this again ignores the difference between such words as "use", "supply" and "distribution" which connote no mutuality of action, and "exchange" and "interchange", which involve only reciprocal action.

It is attempted in the briefs under answer and reply to find implied duty and power with respect to the interchange of cars, first, as an incident to through routes, and, if that does not suffice, in unrelated words contained in the Act.

The Commission urges (p. 14) that "If Seatrain were a railroad" the petitioner railroad carriers could be compelled to interchange cars with it. That may be conceded to the extent that the transportation involved is within the United States. The duty to interchange cars with other railroads rests, however, on specific statutory requirements, to-wit: the car service provisions, Sec. 1(10) to (14). No such provisions exist with relation to carriers by water. The Commission in its brief does not now contend that such duty with respect to railroads existed prior to 1910 when, by the Mann-Elkins amendment, carriers subject to the Act were for the first time specifically required "to make reasonable rules and regulations with respect to the exchange, interchange, and return of cars used" in through routes. Indeed, the Commission contemporaneously recognized that the earlier acts which contained no such specific provision for interchange of cars, imposed no such duty. See our Main Brief, pages 28-31. It is true that the Commission cites authorities (pp. 17-8) in support of the proposition that "In view of the statutory obligation of carriers to maintain through routes and facilities for operating through routes" the Commission may require interchange of cars between rail carriers which are parties to a through route, but examination of those cases, particularly *Missouri & I. Coal Co.* v. *Illinois Central R. Co.*, 22 I.C.C. 39, where alone the question was discussed, shows that the power was assumed to stem from the above-quoted portion of the Mann-Elkins Act. In a later discus-

sion of this case, *Car Supply Investigation*, 42 I.C.C. 657, at page 671, the Commission referred to the above language of the Mann-Elkins Act as the basis of the *Missouri & I. Coal Co.* decision. When this Court, in *Chicago, Rock Island & Pacific Ry. Co.* v. *United States*, 284 U. S. 80, cited the *Missouri & I. Coal Co.* case (Commission's brief, p. 23, Seatrain's brief, p. 25) the controlling factor was the provision added by the Mann-Elkins Act. The dissenting opinion by the present Chief Justice makes it manifest that no duty to interchange equipment existed prior to that act, for he there said (p. 102):

> "* * * in 1911 * * * the Interstate Commerce Commission, under the amended Interstate Commerce Act, decided that carriers could not refuse to permit their freight cars to pass onto rails of connecting carriers."

In support of the same proposition Seatrain likewise cites (pp. 22-4) the *Missouri & I. Coal Co.* case, and by ingenious paraphrase, enclosed in inner quotation marks, in the course of quotation from the opinion seeks to evade the basis, stated above, for that opinion, viz.: the exchange, interchange and return provision of the Mann-Elkins Act. At the top of page 23 of its brief, Seatrain quotes the statement of the Commission that railroads which have established through routes are required to serve the same without respect to the fact that this may carry their equipment beyond their own lines. The quotation concludes with the Commission's phrase, "In the opening section of the Act, is to be found this mandate:", and for the language of the statute which followed in the opinion is substituted an inaccurate and misleading paraphrase, viz.:

" '(here the Commission cited those provisions of the Act requiring the establishment of through routes and furnishing of facilities for their operation, which provisions will now be found in Sec. 1(4).' "

Literally, this approximates the truth. With some changes the provisions requiring the establishment of through routes and furnishing facilities for their operation which were then cited by the Commission, are now in Sec. 1(4). But the provision for interchange of cars which was contained in the same citation is no longer in Sec. 1(4). It is now to be found only in the car service provisions, expressly limited to carriers by railroad. See our Main Brief, pages 26-7.*

Seatrain, in further support of its submission in this respect, cites authorities which, it says (p. 22), held that Sec. 3(2), now Sec. 3(4) required a railroad to interchange cars.* *Toledo, A.A. & N.M. R. Co.* v. *Pennslyvania Co.*, 54 Fed. 730 and 54 Fed. 746, involved injunctions to prevent a secondary boycott against non-union plaintiffs resulting in discrimination.. Of Sec. 3(2) the Court there said that it required "one common carrier * * * to freely interchange freight with another when their lines connect". 54 Fed. at page 736. The question of compulsory interchange of cars was not there considered. *Chicago, Burlington, etc. R. Co.* v. *Burlington C.R. & N. Ry. Co.*, 34 Fed. 481, also dealt with a secondary boycott. The duty to receive and move cars tendered by complainant was admitted by the defendants

* The purpose of that section, which remains substantially as originally enacted in 1887, was to prevent undue prejudice or preference. *Maloney Tank Mfg. Co.* v. *Atchison T. & S. F. R. Co.*, 153 I.C.C. 741, 749.

and was based, in part at least, on a state statute specifically requiring railroads to receive and transport cars furnished by any connecting road.* These cases, Seatrain says (p. 22) "were cited with approval in *Peoria Ry.* v. *United States*, 263 U. S. 528, 535". They were, but upon the proposition, wholly immaterial in this case, that courts may enforce certain duties imposed by the Act by mandatory injunction.

We are unable to find in *St. Louis, S.W. Ry.* v. *Arkansas*, 217 U. S. 136, the "approval" with which Seatrain says (p. 24) that this Court quoted the language of the lower court. Apart from that, however, it is to be noted that it is not there said that any Federal legislation required an interchange of cars, an issue not there presented. Indeed, the railroad company there sought to excuse failure to furnish sufficient shipping facilities, as required by a state statute, by the need for their cars to interchange in interstate commerce pursuant to the American Railway Association Rules. This Court held that the determination of the sufficiency of those rules was exclusively within Federal control, and beyond the power of a state court.

The Commission asserts (pp. 22-3) that the car service provisions "did not lessen the Commission's jurisdiction but materially increased it". That may be true, but it is necessary, if the Commission's contention is to prevail, to find that there was jurisdiction in the Commission to compel interchange of cars in the absence of statutory provision such as is contained in the car service sections. The

* In a later decision the Circuit Court of Appeals for the same (8th) circuit held that there was no duty to interchange cars. *Little Rock & M. R. Co.* v. *St. Louis S. W. Ry. Co.*, 63 Fed. 775, 778-9. See also, *Oregon Short Line & U. N. Ry. Co.* v. *Northern Pac. R. Co.*, 61 Fed. 158.

Commission's jurisdiction with respect to the interchange of cars first came into being under the Mann-Elkins Act, as stated above, and was thereafter made more definite and specific by the Esch Car Service Act of 1917, and later by the 1920 Act, Sec. 1(10) to (14).

It is necessary to scrutinize, even at the risk of repetition, the basis upon which the Commission asserts that independently of the car service provisions the duty of the railroad and the Commission's authority "as to car service and interchange are the same where a water carrier is concerned, as in the case of an interchange between rail carriers" (pp. 14-5).

The Commission refers (pp. 16, 19) to the provisions of Sec. 1(4) which require common carriers subject to Part I to "provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers * * *", including carriers by water subject to Part III, and "reasonable rates, fares, charges, and classifications applicable thereto" and upon "establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation."

Manifestly, this provision creates no greater duty with respect to carriers by water than did the essentially similar language in the Hepburn Amendment,* with respect to the

* "* * * the term 'transportation' shall include cars * * * and all instrumentalities and facilities of shipment or carriage, irrespective of ownership * * * and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto." (See our Main Brief, App. pp. iii-iv.)

carriers then subject to the Act. As has been seen, the Commission conceded and represented, at the time of its enactment, that the Hepburn Act gave rise to no such power or duty. Our Main Brief, pages 29-32.

From this provision, coupled with Sec. 3(4), the Commission urges (p. 21) that the duty of railroads to interchange cars with water carriers arises.

Its reliance on Sec. 3(4) in this respect is seemingly inconsistent with the position taken by the Commission in entering the order which is now under attack, for there, although the complaint had alleged a violation of Sec. 3(3), now Sec. 3(4), the Commission made no finding to support a conclusion of such violation, and found only a violation of Sec. 1(4).

While we shall consider Sec. 3(4) more in detail hereinafter, it suffices at the present place to say that the requirement of that section that carriers shall afford facilities for the interchange of traffic, is as old as the Act itself, 24 Stat. L. 379, Sec. 3.* We have previously noted the recognition of the fact that no provisions which existed in the Act prior to 1910 established the duty to interchange cars or gave the Commission power to compel such interchange. With respect to Sec. 3(4) the Commission definitely held that the section did not confer upon it the power to require a carrier to furnish cars, saying: "The term 'facilities' as here used, does not embrace car equipment for the origination of and transporting of freight along the line of the

* "Every common carrier subject to the provisions of this Act shall * * * afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith * * *."

carrier in the sense in which it is here contended for by the petitioners." *Scofield* v. *Lake Shore & Mich. So. Ry. Co.*, 2 I.C.C. 90, 116, cited and followed in *United States ex rel. Morris et al.* v. *Delaware, L. & W. R. Co.*, 40 Fed. 101, 103. See also, *Railroad Comm'n* v. *Louisville & N. R. Co.*, 10 I.C.C. 173, 188.

Having thus indicated its views as to the source of the duty to interchange cars with water carriers, the Commission in its brief bases its power to enforce such duty upon Sec. 15(3) which gives the Commission power to "establish through routes * * * and the terms and conditions under which such through routes shall be operated." Under the Hepburn Act, Sec. 4 thereof, the Commission was given by similar language like power with regard to carriers by railroad.*

It appears from the foregoing that the power of the Commission to compel interchange of cars between a railroad and a carrier by water is no greater than was the power to compel the interchange between railroad carriers prior to the adoption of the Mann-Elkins Act. It appears further that, although the duty to interchange cars between a railroad and a carrier by water is no greater than was the duty to interchange cars between railroad carriers prior to the adoption of the Mann-Elkins Act, a duty which as we have seen does not exist, Seatrain claims that there is such a duty by reason of the provision of Sec. 1(4) requiring "every such common carrier establishing through routes to provide reasonable facilities for operating such

* "The Commission may * * * establish through routes * * * and the terms and conditions under which such through routes shall be operated."

routes." But it has also been seen that the general obligation to furnish "facilities of shipment or carriage" was also in the Hepburn Act.

This difference in locution is necessarily the shibboleth by which the Commission and Seatrain seek to distinguish the Hepburn Act, which created no duty to exchange cars, from the present Act; with respect to the power to enforce such alleged duty, not even such a ground for differentiation exists, because the power is conferred in no different language than it was prior to 1910.

The contention based on the word "facilities" will not withstand analysis. It is, in effect, that under Sec. 1(4) the carriers are required to furnish "reasonable facilities for operating such routes". Then, ignoring the limiting words "for operating such routes", it is urged that cars are such facilities because in Sec. 1(3) "transportation" is defined as including "locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage." It is also contended, in support of the alleged duty to interchange cars, that there have been various decisions in which cars have been referred to as "facilities".

To avoid being misled by the equivocation which is the basis of the argument founded on the word "facilities", the varying senses in which "facilities" is used in the Act must be noted. Thus, in Sec. 1(3) "transportation" is defined as including "locomotives, cars, and other vehicles, vessels, and all instrumentalities and *facilities of shipment or carriage*". In Sec. 1(4) the "facilities" referred to are those "*for operating such* [through] *routes*". In Sec. 3(4)

the "facilities" are those "*for the interchange of traffic between their respective lines and connecting lines*".

We have shown in our Main Brief (pp. 28, 32) that "facilities" as used in Sec. 1(3) does not include any interchange of cars. Indeed, the definition of transportation quoted above, which has been substantially the same since 1906, viz.: "cars and other vehicles and all instrumentalities and facilities of shipment or carriage", has been said by this Court to be "not much less general than the words of the Act of 1887", to-wit: "all instrumentalities of shipment or carriage", and concerning the effect of the added words the Court said: "There is no advance made by them or enlargement of meaning. There was simply a useless tautology". *United States* v. *Pennsylvania R.R. Co.*, 242 U. S. 208, 226.

Returning to the phrase employed in Sec. 1(4), "facilities for operating such through routes", it would suffice to refer to the submission in our Main Brief, pages 28, *et seq.*, to establish that this does not refer to interchange of cars—a subject exclusively covered by the car service provisions. Apart from that, however, what was meant by that phrase? Clearly it is not synonymous with "facilities of shipment or carriage" as contained in the definition of "transportation", Sec. 1(3), which was first formulated in the Hepburn Act. In *Tank Car Corp.* v. *Terminal Company*, 308 U. S. 422 (Seatrain's Brief, p. 26) this Court was considering the right to an allowance by a shipper which furnished its own cars instead of having its goods transported in cars provided by the railroad. The Court nowhere states that the word "facilities" connotes an interchange of cars.

In this connection Seatrain again refers to the *Missouri & Illinois Coal Co.* case, *supra*, p. 5, this time saying (p. 26) that the Commission "in reaching its conclusion as to the duty to interchange cars, cited Sec. 3(2) [now Sec. 3(4)], and referred to the duty imposed thereby to 'furnish the necessary *facilities* for transportation, * * *.'" The Commission did not there say, however, that "facilities" included compulsory interchange of cars, and, as previously noted, rested its decision on the exchange provision of the Mann-Elkins Act. The same misconception of the reason underlying the foregoing report is again found at pages 38-9 of Seatrain's brief.

In *Hastings Commercial Club* v. *C.M. & St. P. Ry. Co.*, 69 I.C.C. 489, 494 (Seatrain's Br., p. 26) the Commission merely held that a switch engine used only and entirely for handling freight at a terminal is a terminal facility. This is no authority for holding that a railroad car to be placed on an ocean-going vessel, is one of the "facilities for operating" a through route.

The incompleteness of the quotation furnished by Seatrain (p. 26) from *City of Nashville* v. *Louisville & N.R.R. Co.*, 33 I.C.C. 76, 85, makes it misleading. The Commission in fact there said:

> "Section 1 of the act requires carriers by railroad to establish through routes and to interchange cars with connecting carriers.* Through routes and the interchange of cars are thus expressly included among the facilities for the interchange of traffic which the second paragraph of section 3 in turn requires carriers to afford to all connecting carriers

* This refers to the specific provision for interchange contained in the Mann-Elkins Act, see p. 5, *supra*.

equally and without discrimination in rates and charges."

The Commission was there dealing with the question of discrimination, and it is clear that it did not rest any duty to interchange cars upon the requirement "to provide reasonable facilities for operating such through routes". On the contrary, it relied on the express provision requiring interchange, and to the extent that such provision was effective, said that interchange of cars was to be considered a facility for the interchange of traffic.

In no event, however, can opinions such as that last cited, or *Assigned Cars for Bituminous Coal Mines*, 93 I.C.C. 701 (Seatrain's Br., p. 26), dealing with discrimination in affording "equal facilities for the interchange of traffic" under Sec. 3(4), formerly Sec. 3(3) and prior to that Sec. 3(2), throw any light on the meaning of "facilities for operating such [through] routes" in Sec. 1(4).

It is clear that in *Assigned Car Cases*, 274 U. S. 564 (Seatrain's Br., p. 27) this Court was employing "facilities" in a general sense, without definite relation to, or attempt to interpret, that word as used in any part of the Act.

Seatrain pursues this subject at a later place in its brief (p. 29), where it asserts that the provisions requiring establishment of through routes and reasonable facilities for operating them "have been consistently construed as imposing equal obligations in connection with transportation by rail and water". The asserted consistent construction is based upon three reports of the Commission, *Flour City S.S. Co. v. Lehigh Valley R.R. Co.*, 24 I.C.C. 179; *Chattanooga Packet Co. v. I.C. RR. Co.*, 33 I.C.C. 384; and *Pacific*

Navigation Co. v. *Southern Pacific Co.*, 31 I.C.C. 472. In none of these is any consideration given to the matter of interchange of cars.

Assuming, however, that cars are "facilities of shipment or carriage" within the meaning of Sec. 1(3), it does not follow that they are "facilities for operating" through routes, under Sec. 1(4). As previously noted, the definition of "transportation", including cars and "all instrumentalities and facilities of shipment or carriage" has existed ever since the Hepburn Act, but the duty then created to furnish such transportation and establish through routes did not suffice to require the interchange of cars. There is no more reason to include interchange of cars in "facilities for operating" through routes than there would be so to include "facilities for the interchange of traffic". The special provisions with respect to the latter, Secs. 3(4) and 305(d), demonstrate that the former phrase has a constricted meaning, not extending to "facilities" generally.

Even were the phrase "facilities for operating" through routes ordinarily susceptible of including interchange of cars, such interpretation must give away, in view of the specific coverage of such interchange by the car service provisions. "General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment". *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208. "* * * specific terms covering the given subject matter will prevail over general language of the same or another statute which might otherwise prove controlling." *Baltimore N. t'l Bank* v. *Tax Comm'n*, 297 U. S. 209, 215.

Both the Commission and Seatrain offer, as an alternative solution of their problem, the power of the Commission to "establish * * * the terms and conditions" under which through routes shall be operated, the Commission citing Sec. 15(3), (pp. 17, 20, 21, 23), and Seatrain citing not only that paragraph (pp. 3, 33, 72), but also Sec. 6(13), (pp. 29-31). "Terms and conditions" cannot be extended and distorted to the extent of authorizing compulsory exchange of cars, any more than it could be deemed to require establishment of physical connections,—a subject specifically dealt with by the statute, Sec. 6(13)(a). Independent of that, however, as early as the Hepburn Act of 1906, the powers enumerated in Sec. 15(3) were granted to the Commission, to "establish through routes,* * * and the terms and conditions under which such through routes shall be operated". It was made clear by the Commission itself that the Commission could not, under that provision, compel railroads to interchange cars; by the same token, similar powers with regard to through routes between carriers subject to Part I and Part III, respectively, do not authorize compulsory interchange of cars between them. We have seen that the Commission in its report held that its authority to make the order complained of flowed from the duty of railroad carriers to interchange cars, which in turn was implied from the duty to establish through routes imposed by the Hepburn Act in 1906, which also conferred the authority upon the Commission to establish such routes (R. 47, 48, 49). The District Court was unable to accept this basis for the Commission's authority and sought to find the power in Sec. 1(14)(a) (R. 120). Counsel for the Commission and for the United States do not attempt on this appeal to sustain the District Court's theory that the power can be found in Sec. 1(14)(a). On the contrary,

they seek to find the source of the power in Sec. 15(3). However, in this respect Sec. 15(3) is in substantially the same language as that originally in the provisions of the Hepburn Act (see Appendix p. i). We have heretofore seen that the Commission represented to Congress that the Hepburn Act did not confer any such authority and repeatedly requested of Congress a specific grant of such power.

In short, the duty to interchange cars, and the power to compel performance thereof, rest exclusively on the car service provisions, applicable only to carriers by railroad, Sec. 1(10), *et seq.*

The Commission's *argumentum ad hominem* (pp. 20-1) that "For a long period railroads and water carriers have interchanged cars", and that the petitioner railroad carriers have "consented to the delivery of their cars to every water carrier except Seatrain", might well be passed over.

It is, however, appropriate to say that voluntary action in one case is no warrant for compulsion in another; and also that Seatrain is unique (R. 608).

Seatrain pursues this thought to a greater extent. It insists (pp. 28, 35-8), with complete irrelevancy, that petitioners have not contested their obligation, pursuant to the Commission's order in Docket No. 25727, 226 I.C.C. 7, to establish and maintain through routes for through transportation via their lines and Seatrain, and quotes (pp. 35-6) certain findings there made, to which "petitioners have taken no exception".

As no order for interchange of cars was made in that case, it was not possible there to raise, by exception or

otherwise, the issue of the duty to interchange cars with Seatrain. Furthermore, the proceeding now under review, Docket No. 25728, brought by Seatrain's subsidiary, Hoboken Manufacturers Railroad Company, being separate and distinct from Docket No. 25727, brought by Seatrain itself, no exceptions could be taken in the present proceedings to findings made in No. 25727.

Finally, on this subject, the Commission repeats (pp. 22-3) its assertion that "the car service provisions do not diminish but rather facilitate the Commission's ability to enforce appellee's statutory obligation to interchange cars", and Seatrain echoes the thought (pp. 30-40). This assumes that at some time prior to the enactment of the car service provisions there was an obligation that railroads exchange cars with carriers by water such as Seatrain. As previously noted, no duty to interchange cars with *any* other carrier existed prior to the Mann-Elkins Act of 1910. That act clearly was not intended to require interchange with a water carrier such as Seatrain, for none such was then known, nor had any come into existence when the car service provisions were first adopted in 1917, or when the provisions for rules with regard to interchange of cars were, in 1920, taken out of Sec. 1(4). Seatrain's predecessor, in 1929, provided "the first car-carrying vessel capable of being operated independently of a railroad" (R. 608).*

* Manifestly, transportation of freight in cars by railroad-operated car ferries, which by definition of Sec. 1(3) are included in the term "railroad", such as those concerned in *Pennsylvania Co., Operation of Transportation Co.*, 34 I.C.C. 47, and the cognate cases cited by Seatrain (p. 31), has no analogy to the situation which arose upon the birth of the Seatrain-type vessels.

Repeated at various stages in Seatrain's brief, is the cry of public interest and policy (pp. 18, 32, 35). The obvious answer is that when Congress adopted the Transportation Act of 1940, it maintained and continued the limitation of the car service provisions to carriers by railroad, carefully designating such carriers as "subject to this part".

Answering "II" in Commission's Brief and "Point II" in Seatrain's Brief.

As previously noted in our Main Brief (pp. 45-8) the Commission sought to justify its asserted power to compel interchange of cars by the railroads with Seatrain on the ground that it necessarily flowed from the carriers' duty to establish through routes as provided in Sec. 1(4) of the Act (R. 48). The District Court while finding the duty under the provisions of Sec. 1(4) held that the Commission's power to compel the interchange was dependent on the car service provisions (Main Brief, pp. 17-8) and found that these provisions were subject to the territorial limitations prescribed in Sec. 1(1) and (2) of the Act. In its brief on this appeal the Commission now resorts to the provisions of Sec. 15(3) as conferring its alleged jurisdiction to compel the railroads to deliver their cars for Seatrain's use on the route through Havana.

But it is obvious that the territorial limitations of Sec. 1(1) and (2) attach to the provisions of Sec. 15(3) no less than to the provisions of Sec. 1(4) and the car services provisions, Sec. 1(10), (11) and (14). Sec. 15(3) is contained in Part I of the Act and unlike Sec. 6(11) does not purport to confer any powers "in addition to the jurisdic-

tion given by the Act". The Commission now argues (pp. 24, *et seq.*) that since the power given the Commission under Sec. 15(3) is to compel establishment of through routes, applicable to the transportation of property by railroad carriers subject to Part I and carriers by water subject to Part III, it is entitled to read into Sec. 15(3) the definition of "interstate or foreign transportation" contained in Sec. 302(i), in Part III, with respect to carriers by water, and by so doing may extend the duty of the railroads which is provided solely in Part I. The fallacy of this argument is clearly exposed in the opinion of the District Court (R. 123-4) where the Court concludes "if cars are to be gotten from carriers by railroad for the use of carriers by water, it must be by virtue of the provisions of Part I" (R. 124).

We are concerned here solely with the duties of railroads and the jurisdiction of the Commission to compel the fulfillment of such duties; not with the Commission's jurisdiction over water carriers. Whatever jurisdiction over water carriers is conferred by Sec. 302(i) (2) of Part III where the transportation is partly by water and partly by railroad from a place in a State to a place in any other State, Congress was careful to repeat in that same section the territorial limitations of Sec. 1(1) and (2) with respect to the railroads' part of the transportation defined. It provided "such terms shall include transportation by railroad or motor vehicle only insofar as it takes place within the United States", Sec. 302(i)(2). Cars are included in the definition of transportation only as that term is used in Part I, that is, transportation by railroad, Sec. 1(3)(a).

Moreover, Sec. 15(3) does not purport to declare the Commission's jurisdiction over railroad cars. It merely empowers the Commission to determine "the terms and conditions under which such through routes shall be operated". The Commission's jurisdiction over railroad cars is provided in Sec. 1(14)(a). This has been more fully considered, *supra*, page 5 et seq.

The Commission offers a curious argument for the proposition that the territorial limitations of Sec. 1(1) and (2) do not apply to Sec. 15(3). In the first place, it cites (p. 28) the principle that specific terms covering a given subject matter will prevail over general language of the same or another statute. It is not clear what "specific terms" the Commission here invokes. If it means the provisions of Sec. 3(2)(i)(2) they are sufficiently dealt with above. It would appear that where the question is as to the validity of a car service order, the only place specific provisions can be found to resolve the question, is that part of the Act and the specific sections thereof which prescribe the duties of the owners to furnish car service to other carriers and the jurisdiction of the Commission to enforce such duties.

The Commission next urges (pp. 28-9) that Sec. 6(11), formerly 6(13), of the Act referring to transportation from a point in the United States "through the Panama Canal or otherwise" is also in Part I of the Act "and this Court did not hold it restricted by the general language of Sec. 1(1)(b)", (citing cases). Aside from the fact that the through route provisions of former Sec. 6(13) were repealed by the 1940 Amendment, it is sufficient answer to this contention that Sec. 6(11) provides, as did Sec. 6(13) that the jurisdiction there conferred is "in addition to the

jurisdiction given by the Act", etc. Sec. 15(3) contains no such provision.

It is difficult to see how Sec. 5(14), which the Commission cites (p. 29) "as applicable to carriers by water operating to or via foreign ports", aids its submission on this phase of its argument. That section makes it unlawful for certain carriers to own, lease, control, etc., any competing carrier by water operating through the Panama Canal or elsewhere. It is immaterial whether this section applies to the relations of railroads with carriers by water operating to or via foreign ports. The bar is against ownership or control, and has no relation to transportation as such.

The Commission (p. 27) refers to a letter of March 20, 1939 by Commissioner Eastman to the House Committee on Interstate and Foreign Commerce, which it says voices the Commission's objection to a provision in Part III, the water carrier provision of H.R. 2531, 76th Congress, 1st Session, and then quotes the provision in question.

Part III of the bill was not intended as a separate part such as was subsequently embodied in the 1940 Act; it merely contained amendments to the existing Act. As appears from the letter of Commissioner Eastman, the provision quoted in the Commission's brief was contained in "a new subparagraph (c) to section 1(1) of the Interstate Commerce Act." By the new section it was proposed to add to the common carriers to whom the Act applied those engaged in transportation on inland, canal or coastwise waterways of the United States, and to exclude common carriers engaged in the transportation of passengers or property upon the high seas, Great Lakes or any inter-

coastal commerce by way of the Panama Canal. This provision is quoted at page 27 by the Commission.

Following the quotation, the Commission says (p. 27) that Commissioner Eastman's "* * * criticism was that this provision might be construed as repealing the jurisdiction the Commission had over railroad-controlled water carriers (such as Seatrain) operating on the high seas." Commissioner Eastman's criticism had nothing to do with the jurisdiction of the Commission "over railroad-controlled water carriers (such as Seatrain)* operating on the high seas" in the sense that the Commission infers. His first criticism was that as some water carriers operated both on the New York barge canal and the Great Lakes, by the inclusion in the proposed provision of jurisdiction over transportation on canals, but not on the Great Lakes, "* * * the subparagraph may limit our jurisdiction more than was intended." Commissioner Eastman also suggested that the subparagraph might be construed to repeal the jurisdiction which they then had over railroad-controlled water carriers operating on the high seas under Sec. 5(21) of the Interstate Commerce Act, a section which merely gave the Commission authority to extend the time during which a railroad company could continue service by water by means of a competing water carrier operating other than through the Panama Canal. The extraterritorial jurisdiction claimed under Sec. 15(3) to compel railroads to send their cars outside the United States, is not *in pari materia* with the jurisdiction to control monopolistic acquisition of competing lines.

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* The Commission has held that Seatrain is not controlled by railroads (R. 39).

Finally, the Commission contends (pp. 31, *et seq.*) that the amendments made to the Panama Canal Act by the Transportation Act of 1940 were not meant to subtract any of its power; that Sec. 6(13)(b) as it stood before its repeal by the 1940 Act became superfluous because its substance with respect to the Commission's power to determine the terms and conditions under which the lines shall be operated is embodied in Sec. 15(3) of Part I and Sec. 307(d) of Part III.

The Commission (p. 32) and Seatrain (p. 49) refer to Commissioner Eastman's letter to the Conference Committee considering S.2009* and his statement that the Commission did not object to the repeal of Sec. 6(13)(b) because "other provisions of the bill adequately cover this matter". Commissioner Eastman's statement in his said letter was as follows:

> "House Bill. This bill leaves the Panama Canal Act provisions in Section 6(13) undisturbed, except that it repeals 'subparagraph (b)'. See Section 9 of the House bill. We have no criticism of this repeal, for that subparagraph deals with through routes and joint rates between rail and water lines, and other provisions of the bill adequately cover this matter."

This statement was not addressed to the interchange of cars or the territorial jurisdiction of the Commission over through routes between rail and water carriers. It merely recognized that under the new legislation jurisdiction was

* References in the said letter to the Senate bill are to print of of S.2009 dated May 29 as passed by the Senate which contained the definition of "interstate commerce" quoted at page 47 of our Main Brief; references to the House bill are to print of S.2009 dated July 26, showing the Senate text in linetype and the House text in italics.

also conferred *over independent water carriers, i. e.*, water carriers not under the control or management of a railroad carrier, with appropriate provisions in Part I and Part III for the establishment of through routes between water carriers and carriers by railroad.

In this connection the Commission states in footnote 14 at page 32 of its brief that one of the factors motivating Senator Clark's opposition to S.2009 which as amended became the Transportation Act of 1940, was his disagreement (citing 86 Cong. Rec. 11613, 11635) with the Commission's decision in Investigation of Seatrain Lines, Incorporated, 206 I.C.C. 328 (R. 35) "but the bill was passed without the incorporation of his suggestions". Senator Clark's sole objection to the Panama Canal Act provisions of the bill was to a provision removing the prohibition against acquisition and control by railroads of competing water carriers.

In his discussion Senator Clark noticed the finding in Investigation of Seatrain Lines, Inc., 206 I.C.C. 328 (R. 35) that subsequent to the passage of the Panama Canal Act, the Missouri-Pacific Railroad Co. and the Texas & Pacific Railway Co. had acquired stock interest in Seatrain which was such an interest as was contemplated by Sec. 5(19) of the I.C.A., and the fact that the Commission had issued an order permitting the continuance of such stock interest. He referred to Commissioner Mahaffie's dissent on this issue and said, 86 Cong. Rec. 11636:

> "Mr. President, one must be impressed by the strength of Commissioner Mahaffie's position to the effect that there is no warrant in the Panama Canal Act for the Interstate Commerce Commission to authorize a railroad company either to acquire control

> of water carriers or to continue control of water carriers in cases where the control was acquired subsequent to July 1, 1914. Such authority, however, is clearly for the first time granted by the section of Senate bill 2009 as rewritten by the conferees, and, on the statement of the chairman of the Senate committee rewritten at the insistence of the Interstate Commerce Commission itself, in an effort to invalidate an illegal ruling which had no basis in law, as Commissioner Mahaffie pointed out in his dissent."

It is thus apparent that Senator Clark's opposition to S.2009 was not based on any objection to the repeal of the through route provisions of the Panama Canal Act, and was not addressed to any of the through route or car service provisions of S.2009. He referred to Investigation of Seatrain Lines, Inc., *supra*, and the dissenting opinion therein, merely to point his opposition to provisions of the new legislation dealing with control by railroads of water carriers. He made no suggestion whatever as to through route or car service provisions to be incorporated in the new legislation.

The Commission at pages 33-4 cites former Sec. 25 of the I.C.A., which required railroads to issue through bills of lading for property being transported by rail and water to a destination in a foreign country, as proof that Congress has enacted extraterritorial legislation with respect to American vessels on the high seas. That section was repealed by the Transportation Act of 1940. It is submitted that this and the provisions of various shipping acts cited by the Commission (pp. 34-6) have no relevance to the issues of territorial jurisdiction at bar. The question here is as to a railroad's duty to permit its cars to be

taken outside the United States and the Commission's jurisdiction to enforce such a duty. We are not concerned with the Commission's jurisdiction over water carriers.

Seatrain attempts to sustain the Commission's jurisdiction to compel the railroads to deliver their cars for transportation through foreign waters and a foreign port by citing instances of through routes established between railroads and break-bulk carriers, where, of course, interchange of cars was not involved. Moreover, in none of the cases cited on pages 44 and 45 of its brief, was the question of territorial jurisdiction raised or discussed.

Seatrain argues at length as to the Commission's jurisdiction over water carriers. But we repeat, what is involved in the instant case is jurisdiction over railroad transportation and railroad property. That, as was said by the District Court, is "the gist of the question" (R. 124). Therefore, the cases and statutes cited at pages 52-5 of Seatrain's Brief with respect to jurisdiction over water carriers are irrelevant. At page 54 Seatrain repeats an argument made below that since its vessels are American-flag ships, nationality follows the vessels even into a foreign port, and the railroads' cars are on American territory even when the vessels are in the Harbor of Havana. But this Court, in *Cunard S.S. Co. v. Mellon* (1923) 262 U. S. 100, has discredited this doctrine, terming it a mere "figure of speech, a metaphor", and saying, at pages 123 and 124:

> "In support of their contention the defendants refer to the statement sometimes made that a merchant ship is a part of the territory of the country whose flag she flies. But this, as has been aptly observed, is a figure of speech, a metaphor. • • •
>
> "A merchant ship of one country voluntarily entering the territorial limits of another subjects her-

> self to the jurisdiction of the latter. The jurisdiction attaches in virtue of her presence, just as with other objects within those limits. During her stay she is entitled to the protection of the laws of that place and correlatively is bound to yield obedience to them. Of course, the local sovereign may out of considerations of public policy choose to forego the exertion of its jurisdiction or to exert the same in only a limited way, but this is a matter resting solely in its discretion."

Seatrain's argument (pp. 56-7) that since the cars are to be furnished in the United States the order of October 13, 1941 is valid, is pure sophistry. As noted in our Main Brief (p. 49) the opinion of this Court in *St. Louis, etc. Ry. Co.* v. *Brownsville District* (1938) 304 U. S. 295, 298 shows that the delivery of cars there involved would be made in the United States. Nevertheless, it was there held that the railroad carrier was not bound to deliver cars in this country to another railroad carrier for transportation into Mexico.

It cannot be denied that the Commission's order, if valid, compels the railroads to send their cars into foreign waters and a foreign port. In Seatrain's operation, as its President testified (R. 583), its ships leave New York and clear for the foreign port, enter Havana and again clear from the foreign port for Belle Chasse. See page 41 of our Main Brief where this testimony is set forth in the foot-note. As was said by Mr. Justice Holmes in *American Banana Co.* v. *United Fruit Co.* (1909), 213 U. S. 347, at page 357, "all legislation is *prima facie* territorial". Seatrain has made no showing that the statute confers such extra-territorial jurisdiction upon the Commission, and has cited no case supporting such jurisdiction.

Answering "III" in Commission's Brief and "Point III", Subdivisions "A" and "B" in Seatrain's Brief.

The Commission and Seatrain assert (Comm., p. 37, Seatrain, pp. 57-9) that the allegations of confiscation in the complaint do not meet the prescribed requirements of particularity. We submit that it appears from the complaint, and particularly from paragraphs XIX, XXVIII, XXX and XXXI (R. 12-3, 16, 17-8), that the order "would necessarily deny to the plaintiff just compensation and deprive it of its property without due process of law." *Aetna Insurance Co.* v. *Hyde*, 275 U. S. 440, 447. The facts relied on are specifically set forth, and, therefore, the constitutional protection is sufficiently invoked under the authority of the cases cited by the Commission and Seatrain. The petitioning railroads raised the question of their constitutional rights before the Commission (R. 677, 1039, 1311), although not required to do so in order to preserve their right to rai-e this issue in the present suit. *Baltimore & Ohio R.R. Co.* v. *United States* (1936), 298 U. S. 349; *San Joaquin Co.* v. *Stanislaus County* (1914), 233 U. S. 454, 459; *Manufacturers Ry. Co.* v. *U. S.* (1918), 246 U S. 457, 488.

The Commission further asserts (pp. 38-41) that the *per diem* rate to be paid by Seatrain, based on the finding in *Rules for Car-Hire Settlement*, 160 I.C.C. 369, 378, "does cover the cost of car-ownership, not only during productive service, but also during idle periods". The quotation from the cited report shows that the rate fixed took into account the time during which cars were in unserviceable condition and when the supply of cars exceeded the demand; it

did not consider or allow for the unproductive days when the cars "are hauled empty, when they are being conditioned and placed for loading" (R. 63-4). Moreover, the finding made in the 1941 report, quoted at page 40 of the Commission's brief, is applicable only when payment is made from the time the cars are made available to the connecting carrier; the provision in the order that Seatrain can be asked to pay "only for such period as the cars are in its actual possession" suffices to establish that confiscation will result from the order. (See also Seatrain's brief, p. 59).

The argument of the Commission based on the "past treatment of other water carriers", and "the saving to the owner on car repair bills" (pp. 41-3), and the similar submission by Seatrain (pp. 59-60) are sufficiently met in our Main Brief (pp. 63-7).

Seatrain suggests that petitioners may not complain of not being permitted to charge Seatrain for the days when the cars are being held for Seatrain (pp. 61-2), because Seatrain's burden is assumed by someone else. (See also Commission's brief, pp. 43-6). We submit that a person deprived of his property is not afforded the constitutional protection to which he is entitled unless the person receiving the property is compelled to pay therefor; the fact that payment may be made by some other person voluntarily, or because of some secondary liability, does not meet the constitutional requirement. Moreover, the order of the Commission does not provide for payment by anybody, and payment to the owning railroad is not secured by any process of law.

With regard to the Commission's attempted analogy to "break-bulk traffic" (pp. 44-6), see our Main Brief (pp. 58, *et seq.*).

While it is wholly immaterial, Seatrain's statement on page 60, in paragraph "5" appearing on that page, that the petitioners "did not question the amount of the compensation to be received by them until nearly six years" after the institution of this proceeding, and that then, in 1938, Hoboken and the Lower Coast applied "for the entry of an order because of petitioners' failure to comply with the Commission's decision", requires some comment in the interest of accuracy.

The Commission's first report in these dockets was made on February 5, 1935, 206 I.C.C. 328, 331, 344, and dismissed the complaints therein. There was no occasion for the petitioners to object until such time as complainants sought an entry of an order in those dockets respecting delivery of cars to Seatrain. This they did promptly when complainants' motions therefor were filed (R. 668, 674-679).

Answering "IV" in Commission's Brief and "Point III", Subdivision "C" in Seatrain's Brief.

In our Main Brief (pp. 52-6) the invalidity of the order was asserted because it failed to contain any direction against Seatrain, and did not provide adequate protection for the return of the cars or compensation for their use. The Commission's asserted excuse for its failure to afford the necessary protection, to-wit: that the order was, as it now phrases it (p. 46) "to all intents a cease and desist order", was there considered (p. 54).

The Commission next insists that if petitioners are not paid the $1 per diem "they are not required to permit the delivery of their cars to Seatrain" (p. 47). Seatrain makes the same submission (p. 63). Under the per diem rules, which the petitioners are, by the order (R. 74), required to observe and enforce, payment is not to be made until long after the cars have been used. See our Main Brief, page 54. Does the Commission's present view of the effect of its order, mean that where cars have not been paid for in the past the petitioners are relieved from obeying the order? That is hardly possible, for the Commission well knew that no settlement for past due per diem had been made with the Pennsylvania, and there had been no payment to other railroads for eight years. Our Main Brief, page 53, note. The petitioners are afforded no security either for the return of their cars or for payment for their use by any effective condition.

In view of the fact that Seatrain's brief is an answer to our Main Brief, it is surprising to find a repetition (pp. 63-5) of the wholly irrelevant argument that it could not be compelled to pay petitioners for their cars because they would not accept direct payments from it. We directed attention in our Main Brief (p. 55, note) that this was not the fact, and that the Per Diem Rule on which the assertion was based "applies only to cars interchanged within Canada, Cuba or Mexico".

The Commission makes a submission similar to Seatrain's concluding with the statement "Thus the Association of which appellees are members, under the order of the Commission, has the power to bring about the direct settlement which all parties seek * * *" (pp. 47-8). This can only mean that the Commission now assumes that it

can fulfill its functions by delegating such power as it may have to another. The fact is that the Commission has not attempted any such delegation of power but, as shown by the concluding paragraph of its findings (R. 71), has specifically left these petitioners to recover as best they may. This can only mean that the Commission believes it has fulfilled its functions by delegating its power to another. What is in issue is whether petitioners are constitutionally entitled to adequate protection for the return of their cars and for payment for their use. This the order fails to afford, and therein it violates petitioners' constitutional rights.

Respectfully submitted,

JOHN VANCE HEWITT,
JOHN A. HARTPENCE,
JOSEPH F. ESHELMAN,
R. AUBREY BOGLEY,

Counsel for The Pennsylvania Railroad Company, et al., Appellants in No. 48, Appellees in No. 47.

DAVID ASCH,
J. R. BELL,
W. C. BURGER,
CHARLES CLARK,
ROBERT J. FLETCHER,
FRANK W. GWATHMEY,
HENRY A. JONES,
G. H. MUCKLEY,
CONRAD OLSON,
J. P. PLUNKETT,
EDWARD W. WHEELER,
D. LYNCH YOUNGER,
of Counsel.

APPENDIX

Interstate Commerce Act—Section 15, Paragraph 3

The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancellation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section.

(As Amended, 1940. The Corresponding Matter Contained in the Hepburn Act Follows:)

Hepburn Act of 1906

The Commission may also, after hearing on a complaint, establish through routes and joint rates as the maximum to be charged and prescribe the division of such rates as hereinbefore provided, and the terms and conditions under which such through rates shall be operated, when that may be necessary to give effect to any provision of this Act, and the carriers complained of have refused or neglected to voluntarily establish such through routes and joint rates, provided no reasonable or satisfactory through route exists, and this provision shall apply when one of the connecting cariers is a water line.